



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

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Hon. Michael K. Atkinson
Inspector General of the Intelligence Community
Washington, D.C. 20511

Hon. Michael E. Horowitz
Chairperson of the Council of the Inspectors General on Integrity and Efficiency
Inspector General of the Department of Justice
Washington, D.C. 20006

Hon. Allison C. Lerner
Vice Chairperson of the Council of the Inspectors General on Integrity and Efficiency
Inspector General of the National Science Foundation
Washington, D.C. 20006

Dear Inspectors General Atkinson, Horowitz, and Lerner:

I write in response to the September 17, 2019 letter from the Inspector General of the Intelligence Community ("ICIG"), concerning this Office's recent opinion interpreting the meaning of "urgent concern" under 50 U.S.C. § 3033(k)(5).^{*} I also respond to the October 22, 2019 letter from the Council of the Inspectors General on Integrity and Efficiency ("CIGIE") supporting the ICIG's letter. We appreciated the opportunity to consult with the ICIG, as well as with the General Counsel of the Office of the Director of National Intelligence, in the course of preparing our opinion. We also respect the important role that CIGIE and its members play within the Executive Branch. While your letters raise policy concerns about the importance of whistleblowers within the intelligence community, this Office is not an actor on the policy stage. It is for Congress to balance the relevant policies, consistent with the constitutional separation of powers. In providing authoritative legal advice within the Executive Branch, our sole responsibility is to faithfully interpret the statutes as Congress has written them. We did precisely that in our recent opinion, which has been declassified and made public.

While we appreciate that you may disagree with our conclusions about the "urgent concern" provision, your letters reflect certain misconceptions about the opinion, which we address below. Our opinion did not interpret any of the statutory provisions protecting whistleblowers from retaliation, and nothing in our opinion alters the protections that Congress has provided. What our opinion did conclude was that a complaint alleging that President Trump engaged in misconduct during a diplomatic communication with the Ukrainian president did not relate to "the funding, administration, or operation of an intelligence activity" under the authority of the Director of National Intelligence ("DNI"). 50 U.S.C. § 3033(k)(5)(G)(i). But that

^{*} See "Urgent Concern" Determination by the Inspector General of the Intelligence Community, 43 Op. O.L.C. __ (Sept. 3, 2019) ("Opinion"), <http://www.justice.gov/olc/opinion/file/1205711/download>.

conclusion follows from the plain language of the statute. Simply put: The President is not part of the intelligence community as Congress defined it, *see id.* § 3003(4), and his communication with a foreign leader did not relate to any “intelligence activity” under the DNI’s authority. To the contrary, the information in the complaint appears to have been derived from the complainant’s conversations with White House officials and from press accounts, not from any intelligence community operation.

In his September 17 letter, the ICIG contends that the complainant’s allegations “fall squarely within the jurisdiction of the” DNI, because “one of the DNI’s most significant responsibilities is securing our Nation’s elections by leading the Intelligence Community’s efforts to collect, analyze, and disseminate information” concerning foreign election interference. Letter for Steven Engel, Assistant Attorney General, Office of Legal Counsel, from Michael K. Atkinson, Inspector General of the Intelligence Community at 3–4 (Sept. 17, 2019) (“ICIG Letter”). We do not question that the DNI may have an interest in this subject-matter, but the “urgent concern” provision does not turn upon such an interest. Instead, Congress provided that the concern must relate to “the funding, administration, or operation of an intelligence activity” within the DNI’s authority. 50 U.S.C. § 3033(k)(5)(G)(i).

As our opinion explained, there is a material distinction between the DNI’s supervision of intelligence activities directed against foreign threats, including foreign interference in our elections, and the statutory reporting requirement for complaints relating to “the funding, administration, or operation of an intelligence activity.” *See* Opinion at 6–8. We did not conclude that the DNI “is prohibited from reviewing the cause of any . . . alleged interference” in U.S. elections. Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Michael E. Horowitz, Chairperson of CIGIE and Inspector General of the Department of Justice, and Allison C. Lerner, Vice Chairperson of CIGIE and Inspector General of the National Science Foundation at 1–2 (Oct. 22, 2019) (“CIGIE Letter”). To the contrary, we recognized that the DNI “surely has responsibility to coordinate the activities of the intelligence community” in collecting foreign intelligence, and we assumed that he had “general oversight responsibility for preventing foreign election interference.” Opinion at 7 n.7.

The DNI’s authority to address foreign election interference, however, does not mean that every report involving a foreign threat would present an “urgent concern” under the statute. The complaint must relate to “the *funding, administration, or operation* of an *intelligence activity*.” 50 U.S.C. § 3033(k)(5)(G)(i) (emphases added). The statute thus tracks the jurisdiction of the ICIG, which extends, not to every global intelligence threat, but to the activities of those within the intelligence community. *See id.* § 3033(b) (providing that the ICIG may investigate “*programs and activities* within the responsibility and authority of the” DNI (emphasis added)). As we explained, “the ICIG’s responsibility is to watch the watchers in the performance of their duties, not to investigate and review matters relating to the foreign intelligence threats themselves.” Opinion at 10. Accordingly, it would be a mistake to equate the DNI’s “broad legal mandate to address intelligence matters related to national security” with the statutory reporting requirement for complaints arising from within the intelligence community. CIGIE Letter at 1.

We do not take issue with CIGIE’s suggestion that an inspector general’s investigative authority may sometimes overlap with the authority of others in the agency or with the authority of another department or agency. *See* CIGIE Letter at 2 & n.3. Indeed, our opinion identified

examples of such overlap. *See* Opinion at 11. But the courts of appeals have also recognized that an inspector general's jurisdiction is *not* coextensive with the agency's operational authority. *See, e.g., Truckers United for Safety v. Mead*, 251 F.3d 183, 189–90 (D.C. Cir. 2001); *Burlington N. R.R. Co. v. Office of Inspector General*, 983 F.2d 631, 642–43 (5th Cir. 1993). As applied to this complaint, we believe it clear that the complainant's concern with the President's communication with a foreign leader did not relate to “the *funding, administration, or operation* of an *intelligence activity*” under the DNI's supervision.

In viewing the complaint as presenting an “urgent concern,” CIGIE suggests that the ICIG may have overlooked an alternative basis for such a conclusion. According to CIGIE, “allegation[s] that certain officials may have misused an intelligence system also raises an additional claim of a serious or flagrant problem that relates to the operations of the DNI.” CIGIE Letter at 2. As we explained in our opinion, however, “the ICIG did not discuss this allegation in concluding that the complaint stated an urgent concern.” Opinion at 5 n.4. The statute contemplates that, upon receipt of a complaint, the ICIG would investigate and determine whether it “appears credible.” 50 U.S.C. § 3033(k)(5)(B). Because the ICIG's letter did not discuss that particular allegation or determine that it was credible, we did not address it either.

While our opinion drew no conclusions about that particular allegation, we do not believe that the ICIG would have avoided analyzing the matter if it presented a “serious or flagrant problem” relating to the operation of an intelligence activity within the jurisdiction of the DNI. *Id.* § 3033(k)(5)(G)(i). The complainant expressed concern that White House lawyers restricted access to the transcript of the President's call by placing it on a “standalone computer system reserved for codeword-level intelligence information” and suggested that unidentified “White House officials” regarded such treatment as an “abuse of the system.” Neither the complainant (nor the ICIG) identified any statute, order, or policy that would bar such a use of the system, and we are not aware of one.

It is likewise unclear why CIGIE assumes that the alleged actions by White House lawyers would have involved the operation of an intelligence activity under the DNI's authority. According to CIGIE, “the DNI has jurisdiction over the handling of classified and other sensitive information” and this allegation suggests “the misuse of federal intelligence systems within the oversight of the DNI.” CIGIE Letter at 2 & n.2. But CIGIE does not identify the basis for the DNI's jurisdiction, and the Acting DNI recently testified to the contrary. During his September 26 appearance before the House Permanent Select Committee on Intelligence, the Acting DNI repeatedly testified that this ancillary allegation would *not* involve matters under his supervision. He told Chairman Schiff that he had “no idea” what White House lawyers “did with the transcripts, where they put them,” and that “it is not something that would be under [his] authority or responsibility.” When asked whether it would involve the DNI's responsibilities “if a transcript with a foreign leader is improperly moved into an intelligence community classification system,” the Acting DNI said, “it is not underneath my authority and responsibility.” And he further testified that “how the White House, . . . the Executive Office of the President, and the National Security Council conduct their business is their business.” Thus, the DNI does not share CIGIE's view that the facts as alleged would readily relate to the operation of an intelligence activity under the DNI's supervision.

CIGIE also expresses concern with our conclusion that, when a complaint does not present an “urgent concern,” then the DNI need not forward it to the intelligence committees.

According to CIGIE, the statute “specifically entrusted to the ICIG” the determination as to whether a complaint statutes an “urgent concern.” CIGIE Letter at 4. That, however, is not how the law is written. The statute contains a freestanding definition of “urgent concern,” 50 U.S.C. § 3033(k)(5)(G), and it provides that a complainant “may” report such an “urgent concern” to the ICIG. *Id.* § 3033(k)(5)(A). The ICIG shall then “determine whether the complaint or information appears credible.” *Id.* § 3033(k)(5)(B). If the complaint appears credible, then the ICIG “*shall* transmit to the [DNI] a notice of that determination,” and the DNI “*shall*, within 7 calendar days of such receipt, forward such transmittal to the congressional intelligence committees.” *Id.* § 3033(k)(5)(B)–(C) (emphases added).

What the statute specifically entrusts to the ICIG is the determination as to whether “the complaint or information appears credible.” *Id.* § 3033(k)(5)(B). But the statute does not expressly vest either the ICIG or the DNI with discretion to make a controlling “determination” about whether a complaint meets the statute’s definition of an “urgent concern.” We believe it evident that every officer charged with duties under a federal statute must confirm that the words of the statute apply. As our opinion recognized, the applicability of each step of the procedures required by section 3033(k)(5) depends on whether there is “a sound jurisdictional foundation.” Opinion at 7. If the ICIG receives a complaint that does not present an “urgent concern” (even if the allegations “appear credible”), then the procedures are inapplicable; they do not require further action by the ICIG. And likewise, if the DNI “receives a transmittal that does not present an urgent concern,” as in this case, then the statute does not require the DNI to forward a non-urgent-concern complaint to the intelligence committees. *Id.*

We do not believe that there is any conflict or tension between the DNI’s authority to interpret the laws he is charged with administering (including section 3033(k)(5)) and the statutory mission of the ICIG. The ICIG exercises his statutory authority under the general supervision of the DNI, *see* 50 U.S.C. § 3033(c)(3), and when it comes to congressional notification, the statute provides the ICIG with authority to share concerns with the intelligence committees, including by informing the committees of “any differences with the [DNI] affecting the execution of the duties or responsibilities of the Inspector General,” *id.* § 3033(k)(3)(A). In connection with this very matter, the ICIG promptly advised the intelligence committees of his disagreement with the Acting DNI. The Acting DNI, in consultation with this Office, supported the ICIG’s providing such a notification, and that notification began an accommodation process with Congress that led directly to the President’s decision to release the ICIG’s letter, the underlying complaint, and the transcript itself.

Finally, we are confident that our opinion does not diminish the statutory protections that Congress has provided to federal employees and contractors who make good-faith disclosures to inspectors general. *See* ICIG Letter at 7–8; CIGIE Letter at 2–4. Our opinion did not address the scope of any provision prohibiting retaliation against whistleblowers. The ICIG expresses concern that our interpretation of the “urgent concern” statute may bear upon 50 U.S.C. § 3033(g)(3)(B), which protects whistleblowers who make misconduct complaints “concerning the existence of an activity within the authorities and responsibilities of the” DNI, *id.* § 3033(g)(3). But whatever the scope of that provision (which is not identical to the urgent-concern statute), other statutes may protect whistleblowers who make good-faith disclosures even for matters falling outside the DNI’s jurisdiction.

For instance, an intelligence-community employee is protected against any reprisal “for a lawful disclosure of information by the employee to . . . the Inspector General of the Intelligence Community, . . . which the employee reasonably believes evidences . . . a violation of any Federal law, rule, or regulation; or . . . mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 50 U.S.C. § 3234(b). This statute codified the protections of Presidential Policy Directive 19, as implemented in Intelligence Community Directive 120, which similarly protects an intelligence-community employee against retaliation for disclosures reasonably believed to evidence misconduct. Moreover, section 7(c) of the Inspector General Act of 1978, 5 U.S.C. app., protects an employee from retaliation “for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.” These protections extend beyond those matters that are within the authority of the DNI. The scope of the urgent-concern statute, as interpreted by our opinion, in no way diminishes the robust protections that these employees would enjoy under these more general provisions.

We appreciate receiving your views on these matters. We hope that this response addresses your concerns about matters that our opinion did not address. Please do not hesitate to contact me should you have any further questions.

A handwritten signature in black ink, appearing to read 'St. Engel', with a long horizontal flourish extending to the right.

Steven A. Engel
Assistant Attorney General

cc: Hon. Joseph Maguire
Acting Director of National Intelligence